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82-509

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1982

CLYDE ALTON BANKSTON,
Petitioner

VS.

THE STATE OF TEXAS,
Respondent

On Appeal from the Texas Court
of Criminal Appeals

PETITION FOR CERTIORARI
CRIMINAL CASE

STEPHEN F. HEFNER & ASSOCIATES
Stephen F. Hefner
109 West Houston Street
Sherman, Texas 75090
State Bar # 09372000

QUESTION PRESENTED

Whether Petitioner was denied a fair trial and due process of law by the trial court's action in refusing to grant Defendant's Motion for Instructed Verdict of Acquittal, based upon the State's failure to produce evidence corroborating the alleged offense or sufficient evidence proving that Complainant informed a third party of the alleged offense within six months after its commission; admitting into evidence the entirety of Captain Shearer's report, over Defendant's timely objection; failing to grant Defendant's exceptions and objections to the charge of the Court, regarding the question of constitutional warnings prior to alleged statements of confession and the circumstantial character of said alleged statements of confession; failing to grant Defendant's Motion to Suppress Application for Probation, which was filed by Defendant as required by the laws of the State of Texas, and such error was compounded when the court overruled Defendant's Motion for Mistrial After Voir Dire Examination by the State, based upon the prejudicial reference by the prosecutor to such application; failing to grant Defendant's Motion to Suppress the introduction of a Sheriff's possee badge, which error was

compounded when said badge was admitted into evidence over the timely objection of Defendant; granting the State's Motion to Quash Defendant's Subpoenas of Jury Members, over the timely objection of Defendant; failing to grant Defendant's Motion to Suppress Statements of Confession allegedly uttered by Defendant, and such error was compounded in allowing testimony as to such alleged statements in the trial over the timely objection of Defendant; refusing to grant Defendant's Amended Motion for New Trial based upon the State's failure to supply Defendant or his attorney with the criminal record of State's witness, Michael Moravec, in direct violation of the Court's pre-trial order regarding same; and, refusing to grant Defendant's Amended Motion for New Trial upon sufficient grounds presented therein.

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NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

CLYDE ALTON BANKSTON, PETITIONER

v.

THE STATE OF TEXAS

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas is as yet unreported at the date of preparation of the Petition for Writ of Certiorari. It is expected that the opinion will be reported in the Southwest Reporter, Second Series. A copy of the opinion is contained in the appendix hereto. (App. A.)

JURISDICTION

The opinion and judgment of the Court of Criminal Appeals of Texas was delivered and entered on December 29, 1981. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States of America, Amendment XIV, §1:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law."

PROCEDURAL HISTORY

Following Petitioner's conviction, he gave Notice of Appeal. On December 29, 1981, the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas rendered its per curium opinion affirming the judgment of conviction. On January 13, 1982, Petitioner filed his Motion for Rehearing which was overruled by the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas on January 28, 1982, no opinion.

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction under sec. 21.10, Tex. Penal Code Ann. (1974), for sexual abuse of a child. Defendant received an eight year sentence without probation.

STATEMENT OF FACTS

On November 7, 1978, Defendant was arrested and charged with the offense of indecency with a minor. Defendant was also charged with the offense of impersonating a police officer. The charge of indecency with a minor was based upon a report to police by the 16 year old Complainant, Marcella Teresa Moravec, regarding a series of events which transpired between the Complainant and the Defendant on November 5, 1978.

According to the Defendant, on November 5, 1978, he was driving south on Highway 75 from his place of employment, when a north bound automobile entered the median cross-over and abruptly pulled in front of him. He flashed his lights and honked the horn of his vehicle, after which the complaining witness pulled her automobile to the shoulder of the highway and stopped. After stopping his vehicle, Defendant approached the complaining witness' automobile and spoke with her, expressing his concern and anger at her erratic driving. The Complainant was crying and told him that she was lost and had been drinking, after which she requested that the Defendant take her home. Defendant told her that she should not drive until she had "cleared up her head," and told her that he would remain with her until she could safely drive her automobile.

Concerned about the location of the two vehicles on the shoulder of a busy highway, Defendant told Complainant to follow him to a road intersection south of their location where they would avoid the dangerous highway traffic. Defendant returned to his car and, with the Complainant following in her car, drove south on Highway 75 to a paved road intersection of Highways 84 and 75. Complainant followed suit, stopping her car behind the Defendant's on the side of the paved road. The Defendant then walked to Complainant's vehicle and sat down in the driver's seat. Complainant sat in the front passenger seat. Defendant drove the Complainant's automobile approximately 250 feet west on the side road (Highway 84) to an intersecting dirt road, at which location the Defendant turned the car into the entrance of the dirt road, reversed the vehicle and parked on the side of the paved road (Highway 84). After telling the Complainant again that she must get herself under control, Complainant asked the Defendant if he was "the law," and Defendant responded that he was not. Concerning the events which occurred thereafter, the testimony of Complainant and Defendant differs substantially. The contentions of each will be briefly summarized.

According to Defendant, at some point after the car was parked he reached across the passenger seat to lower the window on

the passenger side in an attempt to allow fresh air to reach the Complainant. The Defendant and Complainant conversed, during which the Complainant stated that she would do anything to keep from going to jail, but that she was "on her period." Defendant said that he was not a police officer, and that he did not want anything. According to Defendant, Complainant stated that she would be through with her "period" by Tuesday (November 7, 1978), and for Defendant to call her. She offered to give the Defendant her name and telephone number. Defendant took his wallet from his hip pocket and opened it, revealing the sheriff's posse badge pinned on the inside, and proceeded to look for something on which to write her name and telephone number. Complainant apparently saw the badge and said, "You are the law," to which the Defendant responded that he was not. Complainant gave Defendant a telephone number and the alias of Teresa "Gray." Shortly thereafter, when the Complainant was composed, Defendant drove Complainant's automobile the short distance to the place where he had parked his car and exited Complainant's car. Both cars entered Highway 75 and proceeded south. At a south Denison intersection (of Highways 75 and 69, the latter being the road on which Defendant lives), both cars stopped parallel with one another at the traffic light, and Defendant lowered

his right window to ask Complainant if she "was alright now." She responded that she was "ok", and told the Defendant to call her on Tuesday. Defendant drove home and Complainant apparently proceeded towards Sherman.

The Complainant's version of the foregoing events differs substantially. She contends that in the initial conversation on the side of Highway 75, the Defendant said that his boss would not like her driving in that manner, because he was a police officer. Defendant then allegedly exhibited the sheriff's posse badge. Additionally, Complainant contends that after Defendant entered the driver's side of her automobile, he drove her car onto a dirt road and drove some distance into the bushes. Complainant contends that Defendant then told her that she could either make love to him or he would take her to the courthouse. She said that she was "on her period," to which it is contended Defendant responded by saying that, "she could give him some temporary pleasure." With that statement, it is contended Defendant forced complainant to perform oral sex for approximately five minutes. Complainant testified that her only resistance was to try to pull up her head. She contended that Defendant next asked her for her name and telephone number. Complainant testified that she eventually gave him her correct telephone number, but

gave him the alias of Teresa "Gray." Thereafter, Complainant contends that Defendant followed her in his car for some distance south on Highway 75 until they reached a highway intersection south of Denison.

Complainant arrived home in a very emotional state. She conversed with her brother and mother, but made no mention of an alleged forced oral sex act. Then her brother drove she and her mother to Denison where they met police Captain Shearer and drove to the scene of the alleged offense. They later returned to the Denison Police Station, where Complainant's statement was taken, again without any mention of an alleged forced act of oral sex. Captain Shearer later wrote in his incident report that the Complainant appeared to be intoxicated to some extent (being several hours after she testified that she had had anything alcoholic to drink).

The case was turned over to Lt. Nave, who arranged with Complainant's mother to trap the Defendant if he called Complainant on the telephone. On November 7, 1978, the Defendant was paying a bill when he saw the note in his wallet. He stepped to a pay phone and called the number, and asked for Teresa. The Complainant answered and Defendant told her that he was going to Sherrard Motors soon and that she could meet him there. She agreed, after

which Complainant and her mother notified Lt. Nave. Not long after having placed the telephone call, Defendant proceeded toward Sherrard Motors, where Complainant's car pulled out in front of him on Highway 75. He pulled up behind it and Lt. Nave, who had been parked on the Sherrard property, pulled in behind Defendant's truck. The Defendant testified that when Lt. Nave approached him he stated that the Defendant had been "set up." Lt. Nave testified that the Defendant spoke first, saying that it looked like he was in trouble. Lt. Nave contended that he immediately read Defendant his constitutional rights, while Defendant testified that immediately after being told that he had been "set up," he was told to get into the police car. According to Defendant, Lt. Nave never informed him of his constitutional rights. He was first informed of his rights by Judge Odle at the arraignment which occurred approximately two and one-half hours after the arrest.

On December 7, 1978, Defendant was indicted upon the testimony of Complainant for sexual abuse of a child.

SUMMARY OF ARGUMENT

Petitioner was denied a fair trial and due process of law by the trial court's refusal to grant Defendant's Motion for Instructed Verdict of Acquittal, based upon the state's failure to produce evidence corroborating the alleged offense or sufficient evidence proving that complainant informed a third party of the alleged offense within six months after its commission, pursuant to Arts. 38.07 and 38.17, Tex. Code Crim. Proc. Ann. (1979).

Petitioner was denied a fair trial and due process of law when the trial court admitted into evidence the entirety of Captain Shearer's report over the Defendant's timely objection.

Petitioner was denied a fair trial and due process of law by the trial court's failure to grant Defendant's exceptions and objections to the charge of the court regarding the questions of Constitutional warnings prior to alleged statements of confession.

Petitioner was denied a fair trial and due process of law by the trial court's failure to grant Defendant's Motion to Suppress Defendant's Application for Probation which was filed by Defendant as required by the laws of the State of Texas, and such error was compounded when the court overruled Defendant's Motion for Mistrial after Voir Dire examination by

the state, based upon the prejudicial reference by the prosecutor to such application.

Petitioner was denied a fair trial and due process of law by the trial court's failure to grant Defendant's Motion to Suppress the introduction of a Sheriff's possee badge, and such error was compounded when said badge was admitted into evidence over the timely objection of Defendant.

Petitioner was denied a fair trial and due process of law when the trial court granted the state's Motion to quash Defendant's subpoenas of jury members over the timely objection of the Defendant.

Petitioner was denied a fair trial and due process of law by the trial court's failure to grant Defendant's Motion to suppress statements of confession allegedly uttered by Defendant, and such error was compounded in allowing testimony as to such alleged statements in the trial over the timely objection of Defendant.

Petitioner was denied a fair trial and due process of law when the trial court granted the state's Motion to quash Defendant's subpoenas of jury members over the timely objection of the Defendant.

Petitioner was denied a fair trial and due process of law by the trial court's refusal to grant Defendant's Amended Motion for a New Trial based upon the State's failure to supply Defendant or his

attorney with the criminal record of the state's witness, Michael Moravec, in direct violation of the court's pre-trial order regarding same.

Petitioner was denied a fair trial and due process of law by the trial court's refusal to grant Defendant's Amended Motion for a New Trial upon sufficient grounds presented therein.

REASON FOR GRANTING THE PETITION

Petitioner was denied a fair trial and due process of law by the trial court's refusal to grant Defendant's Motion for Instructed Verdict of Acquittal, based upon the state's failure to produce evidence corroborating the alleged offense or sufficient evidence proving that complainant informed a third party of the alleged offense within six months after its commission, pursuant to Arts. 38.07 and 38.17, Tex. Code Crim. Proc. Ann. (1979).

Art. 38.07, Tex. Code Crim. Proc. Ann. (1979), allows a conviction to be supported on the uncorroborated testimony of the victim of a sexual offense if the victim informed any person, other than the defendant, of the alleged offense within six months after the date on which the offense is alleged to have occurred. This recently amended requirement has been recognized as applicable to all offenses under Chapter 21 of the Texas Penal Code arising after the statute's effective date of September 1, 1975. Hohn v. State, 538 S.W.2d 619, 621 n. 1 (Tex.Crim.App. 1976), Alonzo v. State, 575 S.W.2d 547, 548 (Tex.Crim.App. 1979), Hargrove v. State, 579 S.W.2d 238, 239 (Tex.Crim.App. 1979). In the instant case, no testimony was produced at trial corroborating the alleged offense. Therefore, considerable weight rests upon the question of whether the State satisfactorily proved that the

victim informed any person, other than the Defendant, of the alleged offense within six months of its alleged commission. Appellant submits that the State failed to prove such a fact. When confronted with the Defendant's timely filed Motion for Instructed Verdict of Acquittal, based upon such failure of proof after the prosecution rested its case in chief, the Court allowed the State to reopen its case and introduce the indictment as State's exhibit 2, outside the presence of the jury. Appellant contends that the copy of the indictment does not in and of itself satisfy the requirements of art. 38.07.

At no time during the trial of the instant case, did any witness, including the Complainant, testify that said Complainant informed any person of the alleged offense within six months after the date of the alleged occurrence. Furthermore, the purported testimony of the complaining witness before the grand jury was not recorded. Neither was any witness produced at trial who testified as to the Complainant informing any person of the alleged offense within six months of the alleged crime.

Art. 38.17, Tex. Code Crim. Proc. Ann. (1979), mandates that, in cases where by law two witnesses, or one with corroborating circumstances, are required to authorize a conviction, if the requirement be not fulfilled the Court shall instruct the jury to render a verdict of acquittal, and

they are bound by the instruction. As set forth above, in the case at bar the State did not prove that the victim informed any person of the alleged offense within six months after the date of the alleged occurrence. Therefore, the requirement of art. 38.07, Tex. Code Crim. Proc. Ann. (1979), made it incumbent upon the State to corroborate the testimony of the Complainant. The requirement of art. 38.07 was not fulfilled and the Court was required, under the clear language of art. 38.17, to instruct the jury to render a verdict of acquittal. The Court's failure to respond to the mandate of art. 38.17 was fundamental and reversible error. Such fundamental error was compounded when, at the conclusion of the trial, the Court failed to grant Defendant's renewed Motion for Instructed Verdict of Acquittal.

In conclusion, Appellant contends that the trial court committed fundamental error when it failed, upon the filing of two timely requests, to grant Defendant's Motion for an Instructed Verdict of Acquittal as required arts. 38.17 and 38.07 of the Texas Code of Criminal Procedure.

Petitioner was denied a fair trial and due process of law when the trial court admitted into evidence the entirety of Captain Shearer's report over the Defendant's timely objection.

In the trial below, Defendant sought the admission into evidence of an excerpt

from the report of police Captain J. Shearer, who was deceased at the time of the trial. The relevant portion of the report indicated that the Complainant "had been drinking alcoholic beverage and appeared intoxicated to some degree." Such evidence was sought to be admitted for the purpose of impeaching the credibility of the Complainant, who was the sole witness to the alleged crime. Thereafter the Court admitted the entirety of the report upon the State's introduction.

Defendant introduced the relevant portion of the police report under Art. 3731a, Tex. Rev. Civ. Stat. Ann. (Supp. 1979). Defendant sought the admission of a portion of the report for the purpose of impeaching the Complaining witness. During her testimony, the Complainant repeatedly testified that she had consumed no more than a single can of beer quite some time before the alleged crime occurred. The report of Captain Shearer reflected that the Complainant appeared intoxicated during the investigative interview which occurred later on the evening of the alleged offense. The Complaining witness testified that she had nothing to drink between the time of the alleged incident and the time of her later arrival at the Denison Police Station. It being common knowledge that the consumption of a single can of beer will not create a state of intoxication which will remain sustained over an extended period of time, Defendant

introduced a portion of the report of Captain Shearer in order to controvert the statements of the Complainant as to her consumption of alcoholic beverages on the night of the alleged offense.

Art. 38.24, Tex. Code Crim. Proc. Ann. (1979) provides as follows:

> When part of an act, declaration or conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other, as when a letter is read, all letters on the same subject between the same parties may be given. When a detailed act, declaration conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood or to explain the same may also be given in evidence.

The provision has been interpreted by the Court of Criminal Appeals in Willeford v. State, 489 S.W.2d 292, 293-294 (Tex. Crim.App. 1973), where defense counsel attempted to impeach a witness on the basis of the arresting officer's report. Thereafter the prosecution caused the entire arrest report to be read to the jury over defendant's timely objection. According to the Court's opinion, the State was entitled to introduce so much of the remaining portion of the report as related

to the circumstances dealt with in the Defendant's impeachment attempt. The appellate court held that where a statement is made available to the defendant for impeachment under the so-called Gaskin Rule, the state is thereafter entitled to introduce into evidence only that portion of the statement used which impeaches the witness or which clarifies the same subject. See also: Mabou v. State, 429 S.W.2d 891, 893 (Tex.Crim.App. 1968). Defendant additionally contends that the admission of any part of Captain Shearer's report, beyond those portions introduced to clarify the subject matter treated in Defendant's impeachment effort, was a violation of the hearsay rule of evidence. Article 3731a, Tex. Rev. Civ. Stat. Ann. (Supp. 1979), does not express or imply an intent to abrogate the well settled common law principle of the inadmissibility of hearsay evidence based upon further hearsay evidence. The narrative account, written by Captain Shearer according to his recollection of the Complainant's oral statements, simply does not have the indicia of reliability sufficient to insure the integrity of the fact finding process commensurate with the constitutional rights of confrontation and cross-examination. Porter v. State, 578 S.W.2d 742, 747 (Tex.Crim.App. 1979). In Fite v. State, 158 Tex.Crim. 611, 259 S.W.2d 198, 200 (1953), the Court of Criminal Appeals found that the contents of a police re-

port, which dealt with a description of the suspect where no police officer had witnessed any part of the commission of the alleged offense, were necessarily hearsay. The same may be said in the instant case. The narrative account provided in Captain Shearer's report, excluding his personal observation of the Complainant's intoxication, was necessarily hearsay since he nor any other officer or individual witnessed the alleged incident reported. Of course, portions of the report were not subject to the hearsay proscription if they were not offered to prove the truth of the matter asserted, as in the case of Defendant's introduction of the portion of the report which directly contradicted previous testimony of the Complainant regarding her intoxication.

The Court of Appeals in Fite adopted with approval the sound reasoning set forth in Kelly v. Ford Motor Co., 280 Mich. 378, 273 N.W. 737, 741 (1937), where the Supreme Court of Michigan noted that if each person making reports in investigations were called to the witness stand, the testimony of such parties could be nothing more than hearsay, so far as the actual facts of the claimed incident are concerned. Discussing a provision similar to art. 3731a, Tex. Rev. Civ. Stat. Ann. (Supp. 1979), the Michigan Court ruled that the statute should not be construed in a manner which would make the reports and records admissible, when oral testi-

mony of the same facts would be inadmissible. 259 S.W.2d 200, quoting 273 N.W. 741. See also: Estes v. State, 162 Tex.Crim. 122, 283 S.W.2d 52, 54 (1955); Smith v. Riviere, 248 S.W.2d 526, 530 (Tex.Civ.App.-Texarkana 1951, no writ).

In the instant case, the Complainant testified in open court as to her observations and version of what allegedly occurred between she and the Defendant on or about November 5, 1978, in Grayson County, Texas. Had Captain Shearer been alive and capable of testifying at the time of trial, his testimony as to what the Complainant related to him on the night of the alleged offense would have been merely hearsay. As a general rule, statements made by the victim of the crime out of the presence of the accused which are not admissible under some some specific exceptions to the hearsay rule, are barred by said rule. See: 24 Tex.Jur. 2d, Evidence, §565 (1961). Testimony which reports prior statements of a witness constitutes inadmissible hearsay evidence, although such evidence may become admissible to effect the credibility of a witness. Rogers v. State, 368 S.W.2d 772, 773 (Tex.Crim.App. 1963). The testimony of a sheriff detailing the statement made by the prosecuting witness on the night of an alleged offense constitutes inadmissible hearsay testimony. Hawkins v. State, 147 Tex.Crim. 644, 183 S.W.2d 980 (1944). See: Smith v. State, 574 S.W.2d 555,

557-558 (Tex.Crim.App. 1978); Armentrout v. State, 515 S.W.2d 297, 300 (Tex.Crim. App. 1974).

In the instant case, the entire report of Captain Shearer was introduced into evidence in an obvious effort to bolster the testimony of the sole witness to the purported offense. The report was thus quite clearly offered to prove the truth of the matters asserted therein. There was no effort on the part of the prosecution to introduce only portions of the report which dealt with the Complainant's state of intoxication. It goes without saying that the entire report may not be offered on the theory that, as a whole, it corroborates the Complainant's testimony and, as such, re-enforces her credibility. Such an exception to the hearsay rule would swallow the rule itself.

On the basis of the foregoing, Defendant submits that the trial court committed harmful error in admitting into evidence the entirety of Captain Shearer's report over the timely objection of Defendant, and such error calls for the reversal of the judgment of conviction.

Petitioner was denied a fair trial and due process of law by the trial court's failure to grant Defendant's exceptions and objections to the charge of the court regarding the questions of Constitutional warnings prior to alleged statements of confession.

As is set forth more fully on pages 40

to 48 testimony was offered by the State in the trial of this cause as to statements of confession which were allegedly uttered by the Defendant during the course of his arrest and subsequent conveyance to the Denison Police Station. Defendant timely filed his original Motion and Amended Motion to Suppress Confession and/or Oral Declarations, which was the subject of a hearing out of the presence of the jurors. Defendant's motion was denied, and thereafter Defendant timely objected to the introduction of evidence regarding the alleged statements of confession before the jury. During the course of the trial, Defendant submitted evidence regarding the delay in the recitation of Defendant's constitutional rights and the circumstances surrounding the utterance of the alleged statements.

In Texas, it is grounds for reversal where a trial court's charge fails to instruct the jury not to consider the defendant's confession of the crime charged as any evidence if the jury believed or entertained reasonable doubt that a defendant was advised by police officers before the making of a confession that it could be used for as well as against him on trial. White v. State, 163 Tex.Crim. 77, 289 S.W.2d 279, 281 (1956). Cf: Winegarner v. State, 505 S.W.2d 303, 304-305 (Tex.Crim.App. 1974), overruled on other grounds, 576 S.W.2d 843, 845 n. 1 (Tex. Crim. App. 1979).

In the instant case, Defendant objected to the charge of the Court, prior to the reading of same and after the close of all evidence to the jury, on the grounds that the requirements of art. 38.22, Tex. Code Crim. Proc. Ann. (1979), which provides the rules regarding when a statement may be used, had been violated. According to art. 38.23, Tex. Code Crim. Proc. Ann. (1979), the jury must be charged on the consideration of said alleged statement under such circumstances. The failure to properly charge the jury on the issue of warnings was harmful error to the Defendant and as such requires reversal.

Defendant objected to the charge of the Court on the additional ground that said charge did not include an instruction regarding circumstantial evidence as was requested by Defendant. The failure to submit such instruction resulted in fundamentally harmful error to Defendant.

The record reflects that in the trial of this cause, evidence was offered by the State regarding alleged statements of confession, as is more fully discussed on pages 40 to 48. While the actual utterance and content of the alleged statements was the subject of conflicting testimony below, there can be no doubt that the alleged statements, even if uttered exactly as was testified by the State's witness, do not serve as a direct and clear confession of the particular crime charged. The alleged statements are ambiguous and only

circumstantially relate to the indicted offense. Assuming, arguendo, that the Defendant's statements were uttered just as State's witness, Lt. Nave, alleged, the statements offer absolutely no insight into what type of act may have been perpetrated by Defendant. The following testimony at trial exemplifies this flaw:

> Q: "What did he do?"
>
> A: "He looked at me and said, 'Clyde, I guess I'm in trouble.'"
>
> A: "He said, 'Well, Clyde, it looks like I'm in a lot of trouble.'"
>
> Q: "Do you recall his words?"
>
> A: "It was to the effect, 'I don't know why I did this. She was so pretty and my wife has been out of town.' He told me that 'I'm guilty of this. If you will just help me get out of it, it will never happen again. I don't know why I did it.'"

It is clear from the record that the above-quoted statements were not offered in a context which directly connects them to the substance and elements of the crime of sexual abuse of a child. Indeed, facts which would support a complaint under sec. 21.10, Tex. Penal Code Ann. (1974), were not alleged until the Complainant appeared before the grand jury, one full month after the arrest of the Defendant and purportedly alleged facts constituting the crime of sexual abuse of a child. Prior

to that time, and subsequent to his arrest on November 7, 1978, Defendant was charged only with the offense of indecency with a child. Additionally, it must be noted that there was virtually no corroboration of the testimony of the sole witness to the alleged acts of Defendant. The State quite obviously relied heavily on the alleged statements of confession to "shore-up" its case based upon alleged specific acts which were not reported to a single soul until the Complainant purportedly Defendant was tried.

Under Texas law, even though an accused individual confesses or admits to the commission of a crime, a circumstantial evidence charge must be given unless the record clearly shows through the evidence and a confession that the crime admitted is the same crime for which the accused is being tried. Patterson v. State, 416 S.W.2d 816, 819 (Tex.Crim.App. 1967). See also: Singleton v. State, 543 S.W.2d 138, 140 (Tex.Crim.App. 1976), where evidence of an unequivocal admission by the accused that he killed the deceased rendered the failure to charge the jury, as to circumstantial evidence, harmless error. Where the State places considerable weight on an alleged confession in the development of its case, the refusal or failure to charge on circumstantial evidence is reversible error, if such statements are not direct evidence of the crime alleged. Martinez v. State, 151

Tex. Crim. 316, 207 S.W.2d 387, 389 (1948).

In the instant case, the failure to properly charge the jury regarding the circumstantial nature of the alleged confession was extremely damaging to Defendant. In the absence of the proper charge, the jury of laymen were free to infer that the ambiguous statements attributed to Defendant were a direct admission of the particular crime of sexual abuse of a child. Defendant submits that the failure to properly charge was fundamental and harmful error which calls for reversal of the judgment of conviction.

Petitioner was denied a fair trial and due process of law by the trial court's failure to grant Defendant's Motion to Suppress Defendant's Application for Probation which was filed by Defendant required by the laws of the State of Texas, and such error was compounded when the court overruled Defendant's Motion for Mistrial after Voir Dire examination by the state, based upon the prejudicial reference by the prosecutor to such application.

The laws of the State of Texas make provision for probation in the case of a defendant where the punishment assessed does not exceed ten years imprisonment. Where the punishment is to be assessed by the jury if the defendant is found guilty, a defendant must file a written sworn motion with the court prior to the commence-

ment of the trial requesting probation. Tex. Code Crim. Proc. Ann. art. 42.12 §3a (1979). Section 3a further provides:

> In no case shall probation be recommended by the jury except when the sworn motion and proof shall show, and the jury shall find in their verdict, that the defendant has never before been convicted of a felony in this or any other State.

It is incumbent upon a defendant to file such motion or application prior to trial, regardless of his plea and regardless of his actual guilt or innocence in the case prosecuted.

In the instant case, Defendant filed his Application for Probated Sentence, in the nature of a motion, on March 7, 1979. The filing of said Application was in no way an admission of guilt or plea of guilty to the charged offense. Rather, the application was necessitated by the procedural requirements established in art. 42.12 §3a of the Code of Criminal Procedure. In the realization that the Application for Probation might be mistaken by a jury of layment as an admission of guilt Defendant, through his attorney, duly filed his Motion to Suppress the Application of Probation at the pre-trial hearing, pursuant to art. 28.01 §1(6), Tex. Code Crim. Proc. Ann. (1966). The Court's overruling of the Motion to Suppress was prejudicial to Defendant and an abuse of the Court's discretion.

Subsequently, in the voir dire examination of the jury by the State, the prosecutor specifically stated: "In this particular case, the Defendant has filed an Application for Probation. The law requires this before trial." Immediately after the State completed its voir dire examination of the jury, the Defendant made his Motion for Mistrial alleging that the above-quoted reference to Defendant's Application for Probation was prejudicial and that such mention stood as a barrier to providing a fair and impartial trial for Defendant. The Court overruled the Motion. Defendant contends that his filing of an Application for Probation prior to trial is a fact which would convey the impression of admitted guilt to laymen jurors. To a layman's mind there would be no reason to file such an application unless the Defendant were guilty of the crime charged. In fact, such application must be made before trial, regardless of guilt or innocence, if the defendant wises the jury to consider probation in the event that he is found guilty. Defendant's filing in satisfaction of the requirements of art. 42.12 §3a, Tex. Code Crim. Proc. Ann. (1979), was undertaken only to protect against the contingency that he might be found guilty in the guilt or innocence phase of the trial.

The fact that the Defendant had filed his Application for Probation was permanently emblazened on the minds of the jur-

to providing a fair and impartial trial for Defendant. The Court overruled the Motion. Defendant contends that his filing of an Application for Probation prior to trial is a fact which would convey the impression of admitted guilt to laymen jurors. To a layman's mind there would be no reason to file such an application unless the Defendant were guilty of the crime charged. In fact, such application must be made before trial, regardless of guilt or innocence, if the defendant wises the jury to consider probation in the event that he is found guilty. Defendant's filing in satisfaction of the requirements of art. 42.12 §3a, Tex. Code Crim. Proc. Ann. (1979), was undertaken only to protect against the contingency that he might be found guilty in the guilt or innocence phase of the trial.

The fact that the Defendant had filed his Application for Probation was permanently emblazened on the minds of the jurors when the State made specific reference to same. It was a normal and natural reaction to such a reference for the jurors to infer that the Defendant had admitted his guilt in filing same. The comment by the prosecutor that "the law requires this before trial" did not and could not in itself serve to cure the error or relieve the impression of confession which was impregnated in the minds of the jurors. The State's minimal explanation could have easily been taken to mean that the Defen-

ors when the State made specific reference to same. It was a normal and natural reaction to such a reference for the jurors to infer that the Defendant had admitted his guilt in filing same. The comment by the prosecutor that "the law requires this before trial" did not and could not in itself serve to cure the error or relieve the impression of confession which was impregnated in the minds of the jurors. The State's minimal explanation could have easily been taken to mean that the Defendant who admits his guilt must make his application for probation. The fact that the empaneled jurors later heard the Defendant plead "not guilty" could not erase the mistaken impression that at an earlier time, when the Defendant filed his Application for Probation, he had been willing to admit his guilt. Once the impression of confession had been conveyed to the jury through the reference to the Application for Probation by the prosecutor, there was no possibility of counsel for the Defendant reducing such impression through further discussion of the matter. Any attempt to correct the situation would have served only to further impress upon the minds of the lay jurors the fact that Defendant had personally filed an Application for Probation.

It is axiomatic that one accused of a crime is entitled to be convicted, if at all, only upon evidence that shows he is guilty of the offense charged. White v.

State, 492 S.W.2d 488, 489 (Tex.Crim.App. 1973). In the instant case, Defendant's required Application for Probation was paraded before the lay jurors in the voir dire examination in such a manner as to convey the impression of confessed guilt. Defendant's Application had absolutely no bearing on the voir dire proceedings and should not have been mentioned or even eluded to by the prosecutor as he polled the panel on their feelings concerning probation. While the State would have a clear right in the voir dire examination to ask potential jurors their feelings on the general issue of probation, there could be no justification for the specific statement the prosecutor that this particular Defendant had filed an Application for Probation. The only possible purpose for the prosecutor's mention of Defendant's application was to impress upon the entire group of potential jury members the vivid image of confession through application of probation. The issue of probation is properly before the jury for its consideration only at the punishment phase of the proceedings, in the event a defendant is found guilty and punishment is fixed at less than ten years. See: Phillips v. State, 511 S.W.2d 22, 29 (Tex.Crim.App. 1974).

The mention of Defendant's Application for Probation at the very outset of the trial served to impress upon the jury an image of confessed guilt. The Court's

failure to sustain Defendant's Motion to Suppress with regard to such application was an abuse of its discretion in controlling interrogation of prospective jurors. Defendant was thereafter prejudicially and fundamentally harmed by the Court's failure to grant Defendant's Motion for Mistrial after the irreparable impression of guilt had been conveyed by the prosecutor's prejudicial comment. By reason of such unfair prejudice being created the very outset of the trial, Defendant was denied his opportunity to be judged only upon the evidence of the offense charged. Defendant contends that an abuse of discretion is evidenced both in the trial court's refusal to grant Defendant's Motion to Suppress and in the Court's overruling of the Defendant's Motion for Mistrial.

Petitioner was denied a fair trial and due process of law by the trial court's failure to grant Defendant's Motion to Suppress the introduction of a Sheriff's possee badge, and such error was compounded when said badge was admitted into evidence over the timely objection of Defendant.

The Defendant was charged and convicted under §21.10 of the Texas Penal Code, to-wit: sexual abuse of a child. The only elements of the offense are (1) intent to arouse or gratify the sexual desire of any person; (2) that the defendant engages in devious sexual intercourse with

a child not his spouse; and, (3) that the child is younger than seventeen (17) years of age. It is noted that there is no element of the offense concerning fraud, duress, or malice, nor is scienter, motive or system a question. It is also important to note that there was no question in this case with regard to the identity of the person of the Defendant, nor was an alibi raised.

In addition to the connection of sexual abuse of a child, the Defendant has been charged with impersonating a police officer, arising out of the same alleged transaction or occurrence, and such charges were pending at the time of trial with regard to the Defendant. The offense therein is based upon the alleged exhibition of a badge by the Defendant to the Complaining witness, Marcella Theresa Moravec. The Defendant filed a Motion to Suppress Evidence with regard to the badge and a Motion in Limine, both of which were presented to the Court and both of which were adversely ruled upon by the Court. It is further important to note that a lapse of time between the alleged offense and the arrest existed and that such gap consisted of a number of days, to-wit: from November 5, 1978, at approximately 10:15 p.m. to November 7, 1978, at approximately 3:30 p.m.

In the case of Owens v. State, 450 S.W.2d 324, 325 (Tex. Crim.App. 1969), the Court of Criminal Appeals noted the

general rule that in criminal cases the accused can be convicted, if at all, only by evidence that shows that he is guilty of the offense charged. Evidence that the Defendant has committed other crimes which are remote and wholly disconnected from the offense with which he is charged is ordinarily inadmissible. There are exceptions to this general rule, as set out in 23 Tex. Jur. 2d, Evidence, §195 (1961). The exceptions apply to allow a statement which is part of the res gestae of the offense, or to show identity of the persons or crime, intent, motive, scienter, system or malice. Evidence of other crimes is also admissable to discredit the accused when he testifies in his own behalf, or to show a failure to reform, or to controvert a defensive theory advanced by him. Id. It is important to note the caveat that evidence of another crime should not be admitted unless the commission of the other crime is clearly proved.

In Hafti v. State, 416 S.W.2d 824, 826 (Tex.Crim.App. 1967), it was stated:

> The rule appears to be consistent that if the testimony of the state leaves no question as to the intent or identity of the defendant, proof of an independent crime is not admissible. Also, where there is positive testimony to support the state's case, proof of other independent

offenses is not admissible.

Further, in the case of Powell v. State, 478 S.W.2d 95, 97-98 (Tex.Crim.App. 1972), the court noted that the chain of inference connecting the evidence of the independent crime to the offense being tried must be reasonably immediate. In Powell, testimony of needle marks in the arm of defendant was offered by the State on a theory that evidence of defendant's addiction to narcotics would tend to show motive for the charged offense of theft since a narcotic habit requires substantial sums of money for support. The court pointed out that there was no question as to identification of the accused in the case. Defendant did not testify or offer any defense and thus there was no defensive theory against which such extraneous facts could be marshalled as circumstantial evidence. Echoing the words of United States v. Mullings, 364 F.2d 173, 175 (2nd Cir. 1966), the Court concluded in its reversal of the case that the prejudicial effect of such evidence far outweighs any probative value it might have.

In the instant case, Defendant contends that the charged offense did not require as an element of proof any matter which could have been supported by the introduction of the badge. The introduction of the badge constituted prejudicial and inflammatory matter presented before the jury which should have been excluded and suppressed under the law as stated in the

Owens and Powell cases, and in accordance with the motions timely filed by the Defendant.

Defendant submits that the admission of the badge into evidence, as being connected with another criminal charge unrelated to the instant prosecution, seriously prejudiced the jury against him and prevented his being judged on the relevant facts properly before the jury. Where testimony has been wrongfully admitted, as in the instant case, the Court of Criminal Appeals does not require as a prerequisite to reversal that it positively appear that such testimony resulted in injury. Cascio v. State, 146 Tex.Crim. 49, 171 S.W.2d 356, 363 (1943). However, in the instant case, testimony was offered in the hearing on Defendant's First Amended Motion for New Trial which indicated that the admission of the sheriff's posse badge had a serious inflammatory and prejudicial effect upon the jury members. In the said hearing, Defendant's counsel, Stephen F. Hefner, testified under oath that after the verdict had been read and the jury dismissed, he was approached by one Mr. Kinder of the jury on his way down the courthouse stairway. The juror informed Mr. Hefner that "the badge hurt you the most, the entry of evidence concerning the use of badge by the Defendant."

Upon the foregoing argument and authorities, Defendant submits that the error of the Court in admitting said badge into

evidence was, prejudicial and fundamentally harmful.

Petitioner was denied a fair trial and due process of law when the trial court granted the state's Motion to quash Defendant's subpoenas of jury members over the timely objection of the Defendant.

Shortly after the verdict had been read and the jury released in this cause, Defendant's attorney acquired information which indicated that jury misconduct had occurred during the deliberations on the punishment phase of the trial. Such information was gathered in several extremely brief interviews conducted by staff members of Defendant's attorney in the halls of the courthouse. Thereafter, Defendant's attorney diligently sought to obtain further interviews and affidavits from the jurors. These efforts were unsuccessful and it was quite apparent that the jurors were hostile and unwilling to cooperate with Defendant's attorney or his staff. Having exhausted all other means of obtaining the necessary testimony of jurors, Defendant subpoenaed the members of the jury. The subpoenas were quashed upon the State's motion and over the timely objection of Defendant.

Defendant contends that the granting of the State's Motion to Quash Subpoenas of Jury Members was prejudicial error and an abuse of the trial court's discretion in light of the evidence before the court.

Defendant perfected his Bill of Exceptions to the granting of the State's Motion to Quash Subpoenas of the Jury Members. Testimony offered by Defendant at the hearing on Defendant's Motion for New Trial indicated that jury misconduct occurred in the apparent factual misrepresentation by one or more jurors that the probation office would "let (Defendant) off in two years" if Defendant were granted probation. Such evidence was uncontroverted at the hearing and sufficient to support the subpoenas. See: Prince v. State, 158 Tex.Crim. 320, 254 S.W.2d 1006, 1011, and Clark v. State, 163 Tex.Crim. 54, 289 S.W.2d 288, 289-291 (1956). Additionally, the law indicates that it is reversible error where a juror's misstatement of the law has the effect of increasing the punishment assesed in a criminal case. Scaling v. State, 499 S.W.2d 318, 320 (Tex.Crim.App. 1973). A judgment based upon erroneous assertions of jury members regarding probation law does not reflect a fair and impartial trial such as will withstand an appeal for reversal. See: Farias v. State, 167 Tex.Crim. 546, 320 S.W.2d 281 (1959).

Upon consideration of the testimony at the hearing and the applicable law, it was incumbent upon the court to deny the State's Motion to Quash Defendant's Subpoenas of Jury Members and to allow Defendant to further develop the facts regarding jury misconduct. Due to the hostility of the jury, the subpoenas were the only

remaining avenue open to Defendant for proof of the misconduct. The Court's granting of the Motion to Quash Defendant's Subpoenas of Jury Members was an abuse of its discretion which substantially impaired the rights of Defendant. Defendant submits that such error calls for reversal of the judgment of conviction.

Petitioner was denied a fair trial and due process of law by the trial court's failure to grant Defendant's Motion to suppress statements of confession allegedly uttered by Defendant, and such error was compounded in allowing testimony as to such alleged statements in the trial over the timely objection of Defendant.

Defendant is charged with an offense which allegedly occurred on or about November 5, 1978. Defendant was arrested on November 7, 1978. At the time of arrest it is alleged that the Defendant made certain statements to Lt. Clyde Nave of the Denison Police Department. Contending that the alleged statements were inadmissible, Defendant filed his original and Amended Motion to Suppress which was heard and overruled by the Court. Defendant timely objected to the oral statements when Lt. Nave testified at trial. Over Defendant's objection, the Court refused to charge the jury on the failure to warn Defendant of his constitutional rights and the circumstantial nature of the statements as evidence in the instant prosecution.

The conflicting testimony offered at trial indicates that Defendant made one or more oral statements at the time of his arrest. Lt. Clyde Nave testified that the Defendant stated: "Clyde, it looks like I'm in a lot of trouble, aren't I." Defendant testified that after Lt. Nave told him that he had been "set up," Defendant stated: "Looks like I'm the one in trouble this time." Defendant testified that the statement was made in reference to the fact that Lt. Nave had been assisting Defendant in collecting on numerous bad checks received in the course of Defendant's business. Lt. Nave testified that immediately after the statement was made, he read the Defendant his constitutional rights. Defendant testified that immediately after offering the above-quoted comment he was told to get into the police car. According to Defendant, Lt. Nave never told him of his constitutional rights. He was first informed of his rights by Judge Odle at the arraignment which occurred approximately two-and-one-half hours after the arrest. Regardles of whether Defendant was first informed of his rights at the time of arrest or at the arraignment several hours thereafter, the alleged oral statements of Defendant were inadmissable and should have been suppressed by the Court. Article 38.21, Tex. Code Crim. Proc. Ann. (1979), provides for the use of the statements of an accused in evidence against him if volition

and a lack of complusion or persuasion are shown. However, the use of the such statements is limited by the rules prescribed in art. 38.22 of the Code of Criminal Procedure. Section 3 of art. 38.22, Tex. Code Crim. Proc. Ann. (1979), provides the detailed requirements regulating the use of oral statements of the accused.

The alleged statements of Defendant should not have been admitted as an oral confession since the conditions art. 38.22 had not been met. Defendant was under arrest, according to Lt. Nave, from the time when the officer first made contact upon his approaching the Defendant. Ordinarily, the statements by one in custody about a crime for which he is being held are not admissible. Thumann v. State, 466 S.W.2d 738, 740 (Tex.Crim.App. 1971). The exceptions to this rule appear as the stringent requirements of art. 38.22 §3 as quoted above, which requirements have not been met in the instant case.

Section 5 of art. 38.22 provides, inter alia, for the exception of a statement that is made as the res gestae of the arrest or of the offense:

> Nothing in this article precludes the admission of a statement made by the accused in open court at his trial, before a grand jury, or at an examining trial in compliance with Articles 16.03 and 16.04 of this code, or of a statement that is the res

> gestae of the arrest or of the offense, or of a statement that does not stem from custodial interrogation, or of a voluntary statement, whether or not the result of custodial interrogation, that has a bearing upon the credibility of the accused as a witness, or of any other statement that may be admissible under law.

However, the res gestae exception does not apply to the facts of the instant case. In this case, approximately forty-eight hours transpired from the time of the alleged offense until the time when the statements were allegedly made. Therefore, the statements do not bear the contemporaneous relationship to the crime which is required for res gestae statements.

A more technical issue concerns whether or not the statements constitute res gestae of the arrest. The determination of whether statements qualify as res gestae has been fully treated by the Court of Criminal Appeals in a number of cases. It is clear that in determining whether certain statements are admissible as res gestae, each case must be considered on its own merits. Smith v. State, 514 S.W.2d 749, 752 (Tex.Crim.App. 1974). Three requirements must be met before evidence can be admitted under the so-called "true res gestae rule."

> There must be have been an exciting emotionally stimulating or physically painful event, the admission or assertion must have been made so soon after the occurrence that the declarant is still in the emotional grip of the shocking event, and the assertion must relate to the event before evidence can be admitted under this exception.

Id., quoting Graham v. State, 486 S.W.2d 92, 94-95 (Tex.Crim.App. 1972). In Smith, the statements of the defendant were made some ten to fifteen minutes after he had been arrested. There was no showing of excitement or emotional stimulation on the part of defendant Smith at such time. The Court found that error was committed in the admission of the defendant's inculpatory statements made while under arrest.

In Garner v. State, 464 S.W.2d 111, 112 (Tex.Crim.App. 1971), it was apparent that the inculpatory statements were made approximately one hour after the robbery and some ten or more minutes after the arrest. The Court found that there was no showing of spontaneity or excitement which would make the statements res gestae of the arrest:

> Ordinarily an oral confession or statement amounting to an admission by a person in custody is not admissable in evidence

unless there is a statement of facts or circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, where the instrument with which he states the offense was committed. See art. 38.22, Vernons Ann. C. C. P.

It has long been the rule in Texas that admissions of an accused made while in custody must satisfy the rule as to confessions. See: 2 McCormick and Ray, Texas Practice, Evidence, Section 1123, (2d ed. 1956).

Also, in construing our confession statutes this Court has excluded any act tantamount to or in the nature of a confession and to any unwarranted statement even though it lacks the essential elements of a confession. See: 2 McCormick and Ray, Texas Practice, Evidence, Section 1201, (2d ed. 1956), and 1 Branches Ann. P. C. 2d, Section 82, page 78.

In Lindsey v. State, 172 Tex.Crim 49, 353 S.W.2d 444, 445-446 (1962), the Court of Criminal Appeals found that the record clearly reflected that the statements sought to be excluded by the defendant were made after his arrest in a conversation with the arresting officer while he was being taken to jail from the scene of

the arrest. Under these facts the court found that the oral statements of the defendant to the arresting officer while under arrest were in the nature of a confession and it was reversible error for such statements to be admitted. Id., at 46.

> In an interrogational situation similar to the facts at bar, the defendant in Bates v. State, 167 Tex.Crim. 414, 321 S.W.2d 76, 77-78 (1959), continuously asked the arresting officer to take him home rather than place him him jail. The defendant's pleading continued from the time of his arrest until he was placed in jail. During the course of these repeated requests the defendant made a statement which had the effect of admitting his intoxication. The court found that reversal was warranted due to the fact that the statement lacked the required spontaneity to constitute res gestae. Id., at 78.

From the case of Smith v. State, 514 S.W.2d 749, 752 (Tex. Crim.App. 1974), it appears that three requirements must be met in order for a statement to be admitted under the theory of res gestae. These three requirements are as follows:

> (1) There must be have been an exciting, emotionally stimulating, or physically painful event;

(2) The admission or assertion must have been so soon after the occurrence that the declarant is still in the emotional grips of the shocking event; and,

(3) The assertion must relate to the event.

In the case at bar, the State failed in its proof regarding items (1) and (2) as listed above. At trial, evidence was lacking concerning any such exciting, emotional stimulating or physically painful event having occurred at the time when the statement was made. While Lt. Nave initially testified that the Defendant was upset when confronted by the officer, he later clarified in his testimony that the Defendant was embarrassed, as was the officer, rather than emotionally shocked. The State also failed to show that the statement or admission occurred soon after the occurrence in question. As stated in Smith: "The State . . . failed to establish a period of time between the event and the assertion and did not develop the emotional state of the declarant when he made the admission." Here, as in Graham, it cannot be questioned that the defendant was under arrest when he made the inculpatory statements, because the officer in question testified the Defendant was under as soon as contact occurred in front of Sherrard Motor Company on or about November 7, 1978. Therefore, the alleged inculpatory statements of Defendant should

have been suppressed and excluded in accordance with the pronouncements of the above authorities.

Evidence of statements by Defendant made before he was warned of his constitutional rights should have been excluded because of the failure of such evidence to meet the strictures of Miranda v. Arizona, 384 U.S. 436 (1966). Under the Supreme Court ruling in Miranda, one who is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. Unless and until such warnings any subsequent waiver of rights is demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against a defendant.

At trial, Defendant testified that he was not informed of his constitutional rights until the time of his arraignment by Judge Odle. Lt. Nave testified that he recited the Defendant's rights shortly after the time of his arrest. Regardless of which version of the facts one believes, it is apparent that the initial statement made by Defendant that "...it

looks like I'm in a lot of trouble, aren't I?" or, "...looks like I'm the one in trouble this time," was uttered prior to the recitation of the Defendant's constitutional rights. This being the case, evidence of such statements should have been excluded at trial. It is further submitted that the Defendant, in making such an inculpatory statement, was responding to the initial interrogational comment of Lt. Nave when he stated "Damn, boy, you've been set up." Therefore, an ambiance of interrogation was created by Lt. Nave, placing the responsive statements of Defendant within the provision of the Miranda rule.

In reliance upon the foregoing arguments and authorities, Defendant submits that the trial court committed fundamental error in its failure to grant Defendant's Motion to Suppress Oral Confession and in its subsequent allowance of the introduction of testimony as to the alleged statements of confession. Defendant respectfully prays that the judgment of conviction be reversed.

Petitioner was denied a fair trial and due process of law by the trial court's refusal to grant Defendant's Amended Motion for a New Trial based upon the State's failure to supply Defendant or his attorney with the criminal record of the state's witness, Michael Moravec, in direct violation of the court's pre-trial order regarding same.

Prior to pre-trial hearing in this cause, Defendant filed his Motion to Discover Criminal Records of Witnesses on April 16, 1979. On May 18, 1979, the parties came before the Court for consideration of Defendant's various motions for discovery pursuant to art. 28.01 §1(8), Tex. Code Crim. Proc. Ann. (1966). Upon consideration, the Court sustained each item of Defendant's Motion for Discovery and the Court granted, over the argument of State's attorney, Defendant's separate Motion for Discovery of Criminal Records of Witnesses. The State's attorney answered said motion with "none" and produced no criminal records for its witness, Michael Moravec.

Subsequent to trial before the jury, counsel for Defendant was informed that State's witness, Michael Moravec, had been arrested on one or more previous occasions and that said witness had a criminal record which had not been divulged by the prosecutor. On October 12, 1979, the parties came before the Court to be heard on Defendant's First Amended Motion for New Trial, at which time Defendant's counsel perfected his exceptions.

The State then stipulated that Michael Moravec had been convicted of the charge of public intoxication in 1976, a fact that the State had failed to disclose previously. Additionally, Defendant produced the affidavit of one, Bill Braden, Jr., wherein the affiant stated that State's

witness, Michael Moravec, had been arrested on or about November 6, 1978, while in the company of the affiant, and that Michael Moravec was thereafter taken to the City of Sherman jail where he was formally charged with the offense of driving a motor vehicle while intoxicated. The State thereafter presented its witness who testified that there was no record of an arrest on the dates between November 4 and November 8, 1978 for Michael Moravec.

Defendant submits that the failure of the State to comply with Defendant's Motion to Discover Criminal Records of Witnesses, as granted and ordered by the Court pursuant to art. 39.14, Tex. Code Crim. Proc. Ann. (1979), fundamentally prejudiced his defense. The act with which Defendant was charged was allegedly witnessed by only the Complainant herself. No other witnesses corroborated the facts as alleged by the State. Indeed the Complainant reported the alleged act to no one within six months of such occurrence except, purportedly, the grand jury which handed down the indictment. Under these facts it was incumbent upon the State to support its case with circumstantial evidence through testimony of the Complainant's behavior and state of mind immediately following the alleged criminal act. The State presented such circumstantial evidence through the testimony of Michael Moravec.

Harmful error resulted when the State

failed to produce the criminal record of Michael Moravec which the Defendant would have utilized for the purpose of cross-examination and possible impeachment of the witness. Upon disclosure of such prosecutorial error or misconduct, the Court was called upon to grant Defendant's First Amended Motion for New Trial. The overruling of Defendant's motion was erroneous and fundamentally harmful to Defendant and constituted an abuse of discretion on the part of the trial Court.

Petitioner was denied a fair trial and due process of law by the trial court's refusal to grant Defendant's Amended Motion for a New Trial upon sufficient grounds presented therein.

Upon the rendition of a judgment of conviction and formal sentencing, defendant filed his Motion for New Trial which was thereafter amended and supplemented. On October 12, 1979, the trial court heard Defendant's First Amended Motion for New Trial and therafter overruled said motion. Defendant contends that the court erred in its refusal to grant a new trial and such error was calculated to injure the rights of Defendant.

Art. 40.03, Tex. Code Crim. Proc. Ann. (1979), provides that new trials, in cases of felony, shall be granted a defendant upon the following grounds, inter alia:

> (2) where the court has misdirected the jury as to the law, or has committed any other mater-

ial error calculated to injure the rights of the Defendant;

...

(6) where new evidence material to the Defendant has been discovered since trial. A motion for new trial on this ground shall be governed by the rules which regulates civil suits;

(7) where the jury, after having retired to deliberate upon a case, has received other evidence....

In his First Amended Motion for New Trial, Defendant set forth numerous grounds which fell under the terms of art. 40.03(2), (6) and (7), Tex. Code Crim. Proc. Ann. (1979). In Defendant's motion it was argued that the Court misdirected the jury as to the law in its failure to properly charge the jury regarding Defendant's constitutional warnings and the circumstantial nature of the alleged statements of confession, as is more fully discussed on pages 21 to 26. Ground II of the Motion set forth the Court's material error in its denial of Defendant's Motion to Suppress Oral Confession, discussed infra. The failure to grant Defendant's Motion to Suppress Physical Evidence (a badge), discussed on pages 32 to 36, and the failure to grant Defendant's Motion in Limine regarding the mention of Defendant's Application for Probation, discussed on pages 26 to 32 were set forth.

Additionally, material error calculated to injure the rights of the Defendant was alleged to have occurred in the introduction of the entire police report of Captain Shearer, discussed on pages 15 to 21, the failure to grant Defendant's Motion for Instructed Verdict of Acquittal discussed on pages 13 to 15 and the failure to grant Defendant's Motions for Mistrial. Each of the above-stated grounds for new trial fall within the terms of art. 40.03(2), Tex. Code Crim. Proc. Ann. (1979). Based upon the foregoing facts and authorities, Defendant contends that under the terms of art. 40.03(07), Tex. Code Crim. Proc. Ann. (1979), the trial court should have granted Defendant's First Amended Motion for New Trial. See: Banks v. State, 92 Tex.Crim. 523, 244 S.W. 1014, 1015 (1922). It is submitted that the failure of the trial court to so rule constituted an abuse of discretion which was material and harmful to the rights of the Defendant.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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By:
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Petition for Certiorari was hand delivered to the County Attorney's Office, Grayson County Courthouse, Sherman, Texas 75090, on this the 21st day of September, 1982.

Stephen F. Hefner